82-2110

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

1982-83 TERM

ODIS BEST,

PETITIONER-PLAINTIFF

VS.

RALPH P. EAGERTON, JR.,
AND JAMES C. WHITE, AS
COMMISSIONER OF REVENUE
FOR THE STATE OF ALABAMA,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION OF ODIS BEST FOR WRIT OF CERTIORARI

SUBMITTED BY:

ALVIN T. PRESTWOOD
CLAUDE P. ROSSER, JR.

ATTORNEYS OF RECORD FOR
PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Where parties agree to simultaneously try legal issues and equitable issues together, with the equitable issues to be decided by the trial court, is a jury verdict upon the legal issues dispositive of the equitable issues, where the legal claims were subject to defenses not applicable to the equitable claims?
2. When a state employee with a property interest in his employment is discharged with no pretermination hearing at all, (a) is the procedural due process violation "cured" when the employee is allowed to make a posttermination appearance before his supervisor to respond to the charges, and (b) if so, what is the effect of such "curing?"
3. When a state employee with a property interest in his employment is discharged in a procedurally deficient manner, (a) is he entitled to receive back pay from

the date of discharge to the date of a procedurally proper posttermination hearing and (b) is he also entitled to other compensatory damages caused by the procedural due process violation?

4. When a plaintiff's procedural due process rights are violated twice during the pendency of an action under 42 U.S.C. §1983 and his complaint is amended to seek relief for those procedural due process violations, is he entitled to attorney's fees under 42 U.S.C. §1988 when he prevails on both procedural due process claims (having one state statute declared unconstitutional as procedurally deficient) but is unsuccessful on the other claims in the litigation?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

ODIS BEST	- APPELLANT-CROSS-APPELLEE
RALPH P. EAGERTON, JR.	- APPELLEE-CROSS-APPELLANT

AND

JAMES C. WHITE	- WHO SUCCEEDED RALPH P. EAGERTON, JR., AS COMMISSIONER OF REVENUE.

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REFERENCE TO REPORT OF OPINIONS

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's judgment in Best v. Boswell, 696 F. 2d 1282 (11th Cir. 1983). In Best v. Boswell, 516 F.Supp. 1063 (M.D. Ala. 1981), the trial court denied the petitioner's post-trial motions and the plaintiff's request for an award of attorneys' fees.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 31, 1983. The petitioner's timely petition for rehearing and a suggestion for en banc consideration was denied by the United States Court of Appeals for the Eleventh Circuit on March 22, 1983.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The relevant provisions of the Constitution (FIRST AMENDMENT, FOURTEENTH AMEND-

MENT, §1), federal law (42 U.S.C. §§ 1983, 1988) and Alabama law (1975 Code of Alabama, §§36-26-27[a], 36-26-28) are set forth in the Appendix, supra, pp. A50-A53.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Middle District of Alabama on June 12, 1979. The action was filed pursuant to 42 U.S.C. §1983 and jurisdiction was based on 28 U.S.C. §1343. (R. 1-8)[1]

The petitioner, Odis Best, was a former supervisor with the Alabama Department of Revenue, and he sued Charles Boswell, the former Commissioner of the Revenue Department, and two other department officials, seeking damages for their actions in transferring him and demoting him from his supervisory position, and alleging that they vio-

1. References in this petition are as follows: Clerk's Record: R. _____; Trial Transcript: Tr. _____; Court of Appeals' Opinion: 696 F.2d at _____; Exhibits: Plaintiff's Exhibit _____.

lated constitutional rights guaranteed to him by the FIRST and FOURTEENTH AMENDMENTS to the United States Constitution. (R. 1-8).[2]

Ralph Eagerton replaced Charles Boswell as Revenue Commissioner on January 15, 1979 (696 F.2d at 1284), and the petitioner testified at trial that Eagerton assured him that he would be reinstated in his supervisory position (Tr. 121-23), thus the petitioner did not include a request for reinstatement to his supervisory position in the initial complaint's prayer for relief. Further, Mr. Eagerton advised the plaintiff that the filing of the lawsuit against present and former Revenue Department officials would not jeopardize his employment (Tr.

2. Mr. Boswell and Mr. Bradshaw were defendants in the jury trial, Mr. Atkins having been dismissed by consent. The jury returned a verdict in their favor, and there was no appeal from that decision and judgment. 696 F.2d at 1284, n. 1.

The issues raised on the appeal to the Eleventh Circuit and in the instant petition relate solely to Defendant Eagerton, in his individual and official capacity.

123-25), however Mr. Eagerton also indicated that he did not want either himself or the Revenue Department named in the suit. (Tr. 754-55).

The petitioner's demotion and transfer, which gave rise to the lawsuit against Messrs. Boswell, Bradshaw and Atkins arose out of land transactions in which the petitioner purchased 100 acres of property from a lady who had a tax lien placed on the property. He subsequently conveyed a portion of the property to a third party.[3]

Both transactions were ultimately rescinded and litigation arising out of the

3. The plaintiff performed an audit on the personal and corporate income tax returns of Mrs. Elsie Estes. After the audit, in May, 1976, the petitioner purchased 100 acres of land from Mrs. Estes for $7,000.00. Mrs. Estes received $3,000.00 in cash and the petitioner, as part of the purchase price, paid approximately $4,000.00 to pay the outstanding taxes, plus interest and penalties. (R. 299-300). The petitioner conveyed 20 of these acres to his son in August, 1976, and on the same day, his son conveyed these 20 acres to Mrs. Lee Stephens for $9,000.00. The petitioner had negotiated the sale of this property to Mrs. Stephens. 696 F.2d at 1284.

plaintiff's initial purchase was settled in 1978.[4]

In December, 1979, approximately six months after this action was filed, Mr. Eagerton was informed that he was to be added as a defendant.[5] Thereafter, Mr. Eagerton read depositions which had previ-

4. In November, 1976, Mrs. Estes filed a suit against the petitioner, alleging that he had deceived her and exercised undue influence on her in connection with the purchase of the property. 696 F.2d at 1284. After Mrs. Estes' suit was filed, but before the end of 1976, the petitioner had discussions with Mrs. Stephens and her attorney about the land (Tr. 84-86, 919, 931-32, 935), and the petitioner testified that he knew in 1976 that he had to repurchase the property from Mrs. Stephens. (Tr. 84-85, 142-43, 193-95).

   On February 3, 1977, the petitioner paid $10,000 to Mrs. Stephens and she executed a quitclaim deed to the property she had previously purchased. 696 F.2d 1284. The petitioner subsequently filed his 1976 state income tax return, and did not report the sale to Mrs. Stephens. The Estes lawsuit was settled in 1978.

5. Although Eagerton, in his official capacity, was not added as a defendant until January 6, 1980, his attorneys learned of his potential inclusion about one month earlier when a proposed pretrial order was circulated. Initially, no damages were claimed against Eagerton, and he was included only because the plaintiff sought reinstatement to his supervisory position. (Tr. 759-60).

ously been taken for use in this case, and prior to December 12, 1979, Mr. Eagerton reviewed the plaintiff's tax returns for the years in question and found that the sale of the land to Stephens had not been reported in 1976. 696 F.2d at 1284. Eagerton wrote the petitioner a letter on December 12, 1979, requesting that he furnish certain information concerning the petitioner's tax returns for 1976-78. The information Eagerton requested was not related to the land transaction (Tr. 759-62), however, Eagerton testified that he did not mention the land transaction at that point because he wanted to see what petitioner would do about the transactions on his tax return. (Tr. 766-67).

After petitioner received Eagerton's letter, they had a conference in which petitioner testified that Eagerton leaned over, shook his finger at him and said, inter alia:

"if you have or if you do put me

> in that suit and you don't get me out of it if you already have, I am going to fire your God-damn ass; do you understand that.
>
> * * *
>
> You know I am already on your income tax right now. I already knew you was [sic] going to do it, and I am already on your income tax."

(Tr. 130-31; 696 F.2d at 1284).

On or about January 7, 1980, the petitioner provided certain information which the Commissioner requested of him regarding his tax returns, along with a check for other claims and credits which he had decided to forfeit. (Plaintiff's Exhibit 104). In a letter dated January 10, 1980, Eagerton advised the petitioner that this response was unsatisfactory and that he was assigning his file for audit. (Plaintiff's Exhibit 105).

Between February 6 and May 5, 1980, the petitioner communicated both by mail and in person with Mr. David Johnson, the revenue examiner who was assigned to his audit.

(Plaintiff's Exhibits 106, 108, 109, 111, 112; Tr. 141-43).

On May 27, 1980, Mr. Eagerton suspended the petitioner from his permanent, non-probationary Merit System position for two weeks without pay, citing as reasons therefor that he had repeatedly failed to furnish requested information concerning the income tax audit and that he had broken an appointment with an examiner without explanation.[6] (Tr. 780-82; Plaintiff's Exhibit 113). Prior to this suspension, the petitioner was not given details of the charges against him or an opportunity to respond orally or in writing to those charges.

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6. The examiner wanted the petitioner to break down the cost of the 100 acres he had purchased in 1976 and to allocate the portion thereof to be used as the cost basis for the 20 acres he subsequently sold to Mrs. Stephens. The petitioner had never assigned to the 20 acres any particular fraction of the total purchase price. The examiner also wanted information as to a dependency credit which the plaintiff had already forfeited. Since taxpayers generally were not required to supply the requested information under those circumstances, the plaintiff did not understand that he was required to do so. The plaintiff contested the taxability of the land

On June 9, 1980, Mr. Johnson and another examiner named Hodges delivered a letter (Plaintiff's Exhibit 170) to the petitioner at his address. (Tr. 637). This letter asked for documents which had not previously been requested from him (Tr. 638), and Mr. Best provided the examiners with information concerning the original cost of the land he bought from Mrs. Estes. (Tr. 642; Plaintiff's Exhibit 170- A).

On June 11, 1980, the Department of Revenue issued a subpoena to the petitioner, requesting essentially the same records that had been requested in the June 9, 1980, letter. (Plaintiff's Exhibit 172). The requested documents were examined on June 20, 1980, and Mr. Johnson testified that at the conclusion of their review, it was understood the examiners would ask for additional

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transaction and also asserted that he had been entitled to the dependency deduction.

Mr. Eagerton ultimately acknowledged that the breaking of the appointment had never occurred (Tr. 781), although he said it had been reported to him. (Tr. 782).

information if it was needed. (Tr. 646-47).[7]

The revenue department auditors, Johnson and Hodges, met with Eagerton, his attorneys and other revenue department officials on July 9, 1980, at which time Eagerton was given the preliminary opinion that "the audit was going to result in some unpaid taxes." (Tr. 650-51).

On July 15, 1980, the auditors reduced their preliminary results to written form, as tentative adjustments to the petitioner's tax returns and on July 16, 1980, Commissioner Eagerton drafted a letter dismissing Mr. Best from state service based on reasons which were stated in general conclusory terms.

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7. The examiners, through a revenue department attorney, requested additional records by letter delivered to the petitioner's attorney on July 14, 1980. (Plaintiff's Exhibit 176; Tr. 648). When the attorney contacted Mr. Thompson, the revenue department attorney who requested these records, it was agreed that the documents made the basis of this request would be produced at a later date instead of July 16, 1980. (Tr. 649-50).

(Plaintiff's Exhibit 178; 696 F.2d at 1285, n. 2).[8]

Prior to his dismissal, the petitioner was not given additional notice of the charges or an opportunity to be heard on the charges leveled against him. (Tr. 796).

By letter dated July 25, 1980, Mr. Eagerton, at the request of the petitioner's attorney, attempted to delineate the reasons for his dismissal with a greater degree of specificity and particularity. (Plaintiff's Exhibit 182; 696 F.2d at 1285-86).

The petitioner was afforded a hearing before Mr. Eagerton on August 11, 1980. (696 F.2d at 1286). At this hearing, the department did not call any witnesses or present any evidence to support the dismissal charges, and Mr. Eagerton acknowledged

8. Although this dismissal letter purported to dismiss the petitioner as of 5:00 P.M. on July 16, 1980, it was not delivered to the petitioner until the next day (Tr. 796); therefore, the effective date of dismissal was amended to dismiss the petitioner from state service as of 5:00 P.M., July 17, 1980. (Plaintiff's Exhibit 179; 696 F.2d at 1285, n. 3).

that the purpose of this hearing was only to allow the petitioner to appear before him and answer the written charges. (Tr. 825).

After conducting this hearing, Mr. Eagerton took the petitioner's response under advisement and by letter dated August 28, 1980, affirmed his termination, stating that "there is ample reason to believe that each of the charges against you are true and correct." (Plaintiff's Exhibit 190; 696 F.2d at 1286, n. 4).

On August 22, 1980, the petitioner was again allowed to amend his complaint to allege that his discharge from employment violated his FIRST and FOURTEENTH AMENDMENT rights.[9]

The petitioner appealed his dismissal

9. The petitioner sought injunctive relief in the form of reinstatement and back pay, as well as compensatory and punitive damages against Eagerton individually, for the violation of petitioner's procedural and substantive due process rights, and his FIRST AMENDMENT rights. (R. 142, 151-55). Eagerton, in his individual capacity, was initially added as a defendant in an amended complaint on June 11, 1980. (R. 82-83).

to the state personnel board (R. 539-40), and a board hearing was held on February 18, 1981. (R. 372). This hearing was a full-evidentiary hearing at which both sides were represented by counsel and both sides called witnesses, cross-examined each other's witnesses and introduced evidence. The personnel board, by order dated April 6, 1981, sustained the petitioner's dismissal from state service. (R. 373- 74).[10]

On March 10, 1981, the petitioner filed a motion for partial summary judgment (R. 322-26) addressing the procedural due process issues relating to his suspension and termination, along with supporting documents

10. In a pre-hearing conference and in the pre-hearing brief submitted to the personnel board, Mr. Eagerton deleted a charge that the plaintiff had sold personal property without reporting the gain thereon in 1976-78 and he also eliminated the charge that on more than one occasion, the petitioner had broken appointments with the examiners auditing his tax returns. (R. 375). The operative effect of these amendments was to eliminate Charge 2 in its entirety from Mr. Eagerton's revised dismissal letter (Plaintiff's Exhibit 182) and to revise Charge 4 in the manner indicated. Id., 696 F.2d at 1285-86.

(R. 327-48) and a supporting brief. (R. 349-57).

The trial court, by order dated April 29, 1981, granted in part, and denied in part, the petitioner's motion for partial summary judgment. (R. 467-71). Thereafter, the petitioner filed a motion to alter or amend the partial summary judgment which had been entered in his favor, or in the alternative, for an additional partial summary judgment (R. 482-84) with a brief in support thereof. (R. 485-540).

On May 7, 1981, the petitioner also filed a motion for an award of attorney's fees and expenses for his attorneys' efforts on the issues wherein the petitioner had prevailed, i.e., the procedural due process issues.

A jury trial was conducted, beginning on Monday, May 18, 1981, and concluding on Tuesday, May 26, 1981. (R. 848). The jury found in favor of all defendants on May 26, 1981, and judgment was entered in accordance

with the jury's verdict with costs taxed against the petitioner. (R. 847).

After the trial had concluded, the petitioner was allowed to renew his motion to alter or amend the partial summary judgment previously entered in his favor, or alternatively, for additional partial summary judgment. (R. 542, 841-43). This motion was denied by the trial court on May 29, 1981. (R. 868-70).

On June 4, 1981, the court, in substance, denied defendant Eagerton's motion to reconsider its April 29th order granting, in part, the petitioner's motion for partial summary judgment. (R. 871-72). On this same day, the petitioner filed a motion for a new trial, or, alternatively, to alter or amend the judgment (R. 873-74) seeking, inter alia, injunctive relief in the form of reinstatement with full back pay.

On June 16, 1981, the trial court denied the petitioner's motion for a new trial, his request for injunctive relief,

and his motion for an award of attorneys' fees. (R. 910-16; Best v. Boswell, 516 F.Supp. 1063 [M.D. Ala. 1981]).

The petitioner's notice of appeal to the United States Court of Appeals for the Eleventh Circuit was filed on July 15, 1981 (R. 942), and on July 28, 1981, Eagerton in his official capacity cross-appealed. (R. 946).

The issues raised by petitioner and addressed by the Eleventh Circuit included the trial court's refusal to grant additional relief on the procedural due process defects in connection with his termination, the refusal to award equitable relief in the form of reinstatement and back pay, and finally, the trial court's refusal to award attorney's fees. (696 F.2d at 1284). The issue raised by Eagerton's cross-appeal involved the trial court's declaration that a state statute, 1975 Alabama Code, §36-26-28, which sanctioned an employee's suspension without a hearing was unconstitutional as violative

of the procedural due process guaranty embodied in the FOURTEENTH AMENDMENT.

In its opinion rendered on January 31, 1983, the Eleventh Circuit Court of Appeals affirmed the trial court in all respects, hence, this petition for a writ of certiorari.

ARGUMENT

1. IN THIS CASE, THE PLAINTIFF WAS ENTITLED TO INDEPENDENT FINDINGS BY THE COURT ON THE ISSUE OF EQUITABLE RELIEF, BECAUSE THE JURY'S VERDICT ON THE LEGAL CLAIMS COULD REASONABLY HAVE BEEN BASED UPON DEFENSES NOT APPLICABLE TO THE EQUITABLE ISSUES.

Relying upon Williams v. City of Valdosta, 689 F.2d 964 (11th Cir. 1982),[11]

11. Williams, in turn, relied upon Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11, 3 L.Ed 2d 988, 997-98, 79 S.Ct. 948, 956-57 (1959), Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 489-91 (5th Cir. 1961), and Ingraham v. Wright, 498 F.2d 248, 266 (5th

the panel decision simply holds that, when the parties agree that the equitable issues are to be decided by the judge after the jury verdict, the trial court has "limited discretion to determine the propriety of equitable relief based upon the facts as found by the jury." 696 F.2d at 1288, quoting from Williams, 689 F.2d at 977.

The Eleventh Circuit opinion also ob-

Cir. 1974), aff'd., 525 F.2d 909 (5th Cir. 1976) (en banc); aff'd., 430 U.S. 651, 51 L.Ed 2d 711, 97 S.Ct. 1401 (1977). None of those cases, however, involved situtions where the jury's verdict would not necessarily result in findings of fact dispositive of equitable claims. Beacon held that, absent the "most imperative circumstances," the "right to a jury trial of the legal issues [could not] be lost through prior determination of equitable claims," but it also observed that discretion would need to be used to avoid "irreparable harm while affording a jury trial in the legal cause." 359 U.S. at 510-11, 3 L.Ed 2d at 997-98.

In Thermo-Stitch, the court followed Beacon and found that "there is no showing that the plaintiffs would suffer irreparable injury or that they would have no adequate remedy at law" by requiring a prior resolution of the legal issues by a jury. 294 F.2d at 491. Ingraham simply held that "the issues of fact common to the actions at law and the suit in equity must first be heard and determined by a jury's verdict...." 498 F.2d at 266.

served that the trial court (see Best v. Boswell, 516 F.Supp. 1063, 1064-65 [M.D. Ala. 1981]), had found that it was "implicit in the jury verdict" that the defendant did not discharge the plaintiff because of the defendant's being included in the lawsuit, that the decision to dismiss the plaintiff was not arbitrary and capricious, and that the defendant had good cause to dismiss the plaintiff. 696 F.2d at 1287.[12]

One of the jury's responsibilities was to determine whether Eagerton, in his indi-

12. The panel further observed tht the district court "implicitly found that Best's inclusion of Eagerton in the law suit was not a substantial or motivating factor in Best's dismissal," based upon the trial judge's interpretation of the jury verdict. 696 F.2d at 1288. In view of the defendant's direct threat to fire the plaintiff if the defendant was included in the lawsuit, and in view of the fact that the defendant did not even seek to discover alternative grounds for the discharge until after he learned that the plaintiff was going to include him in the lawsuit (696 F.2d at 1284), it is respectfully suggested that it is difficult to believe that the jury could have disposed of the case by a threshold finding that the defendant's inclusion in the lawsuit was not a substantial or motivating factor in the decision to discharge the plaintiff, rather than upon Eagerton's defenses.

vidual capacity, was liable in damages to the plaintiff for discharging him arbitrarily and capriciously. That decision required an assessment of Eagerton's affirmative defenses, including the defense of qualified immunity.[13] 696 F.2d at 1286. It therefore cannot be said that the jury implicitly found that the plaintiff never crossed the first threshold of his proof on that issue, because the jury's verdict well could have been based upon Eagerton's qualified immunity defense. In the jury trial, Eagerton repeatedly asserted that he relied on the information and advice of third parties.[14]

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13. The trial judge studiously avoided charging the jury that a discharge for maintaining the lawsuit could be justified by a subjective good faith defense. (Tr. 1187-89). However, the subjective good faith qualified immunity defense permeated the trial on the question of whether Eagerton acted arbitrarily or capriciously in his dismissal of the plaintiff. (Tr. 771-72, 782-83, 838-42, 1189-90).

14. Eagerton testified that in dismissing the plaintiff, he relied on information provided to him by Mr. Johnson and Mr. Hodges, the revenue examiners examining the plaintiff's tax re-

The ordering of an employee's reinstatement with back pay constitutes equi-

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turns, and Mr. McElvy, another revenue department official. (Tr. 842).

Mr. Eagerton's charge that the plaintiff filed a false and fraudulent tax return was based on the recommendation of the examiners, his attorneys, and the Assistant Chief of the Income Tax Division (Tr. 771), and he admitted that he, as Revenue Commissioner, did not even know the difference between a false return and a fraudulent return. (Tr. 772). He testified that the charges relied upon to suspend the plaintiff were based on information supplied by Mr. McElvy. (Tr. 782-83). During the course of the audit, Eagerton received reports that the plaintiff was not cooperating, he had broken an appointment, and he had actually threatened the revenue examiner. (Tr. 838). Additionally, Mr. Eagerton relied on advice of counsel in his decision to terminate the plaintiff. (Tr. 842; Defendant Eagerton's Exhibits 32, 53).

At one point, in connection with Eagerton's testimony, the trial court actually instructed the jury that:

> "The evidence is admitted now--it is hearsay evidence, and it is admitted only for your consideration as to what reports were reaching Mr. Eagerton, as to whether he acted reasonably on those reports; for that limited purpose only that he may state what was told to him as the Commissioner of Revenue of the State of Alabama for the actions--for whatever light it may shed on the actions that he subsequently took."

(Tr. 839-40).

table relief. Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980); Williams v. City of Valdosta, 689 F. 2d 964, 977 (11th Cir. 1982). As to such equitable relief, the doctrine of immunity does not apply. Wood v. Strickland, 420 U.S. 308, 314, n. 6, 43 L.Ed 2d 214, 221, n. 6, 95 S.Ct. 992 (1975); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), modified, 583 F.2d 779 (5th Cir. 1978).

The plaintiff thus could not secure the reinstatement through the legal claims he asserted, and he could not be compensated for lost wages on his substantive due process claim through the jury verdict unless he overcame affirmative defenses not applicable to the equitable issues. By allowing the jury verdict to control the legal issues in this case, therefore, the plaintiff is caused "irreparable harm," and is entitled to have his equitable claim decided by the court independently of the jury verdict. See Beacon Theatres, Inc. v. Westover, 359

U.S. 500, 510, 3 L.Ed 2d 988, 997, 79 S.Ct. 948 (1959); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 491 (5th Cir. 1961).

Certiorari is therefore appropriate under Rule 17.1(c) to review the decision of the Court of Appeals as to the binding effect of the jury's verdict, because such decision conflicts with prior decisions of this Court requiring the avoidance of "irreparable harm" when allowing findings or legal issues to control equitable relief.

Certiorari is also appropriate here under Rule 17.1(a) because the decision of the Court of Appeals is in conflict with the decision of the Eighth Circuit in Jungmann v. St. Regis Paper Co., 682 F.2d 195 (8th Cir. 1982). (The parties agreed to submit the issue of the statute of frauds to the trial court, a jury finding thereon was held to be advisory only, and the court was entitled to make its own necessary findings upon that issue). Also, the Ninth Circuit has held

that parties are entitled to know at the outset of a trial whether the decision will be made by the judge or jury. See Pradier v. Elespuru, 641 F.2d 808 (9th Cir. 1981).

2. WHEN A STATE EMPLOYEE IS DISCHARGED WITHOUT BEING ACCORDED MINIMAL PRETERMINATION DUE PROCESS RIGHTS, HIS PROPERTY INTERESTS ARE NOT ADEQUATELY PROTECTED SIMPLY BY VIRTUE OF THE EXISTENCE OF POSTTERMINATION HEARING PROCEDURES, AND THE DEPRIVATION WITHOUT DUE PROCESS IS NOT "CURED" WHEN HE AVAILS HIMSELF OF THOSE POSTTERMINATION PROCEDURES.

Upon this petition for a writ of certiorari, the Court is asked to revisit the issue of what pretermination process is due a discharged state employee who has a property interest in his employment.[15]

In Board of Regents v. Roth, 408 U.S. 564, 569-570, 33 L.Ed 2d 548, 556, 92 S. Ct. 2701, n. 7 (1972), this Court said that,

15. While this argument is limited primarily to the absence of any predeprivation hearing, there were other pretermination violations, also. For example, the charges in the letter of termination delivered before discharge was woefully lacking in specificity. 696 F.2d at 1285, n.2.

"[w]hen protected interests are implicated, the right to some kind of prior hearing is paramount," and must be accorded before the termination is effective except in emergency situations. (Emphasis added). The Court also acknowledged that "balancing the weights of the particular interests involved" determined the "form" of the hearing required, but that such "narrow balancing process" was not to be used to determine whether some form of prior hearing was required. 408 U.S. at 570-71, 33 L.Ed 2d at 557, n. 8.

The case of Mathews v. Eldridge, 424 U.S. 319, 334-35, 47 L.Ed 2d 18, 33, 96 S.Ct. 893 (1976), announced:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

> Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[16]

The Mathews Court reviewed some of its prior cases on the subject of pretermination procedures, including Arnett v. Kennedy, 416 U.S. 134, 40 L.Ed 2d 15, 94 S.Ct. 1633 (1974), and noted that in Arnett:

> "[W]e sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided."

424 U.S. at 334, 47 L.Ed 2d at 33.

The several courts of appeals have generally used the cited cases as precedent

16. In Mathews, the Court observed that it had "spoken sparingly" about whether due process required an evidentiary hearing prior to termination even if a hearing was provided thereafter. 424 U.S. at 333, 47 L.Ed 2d at 32. It also noted that "[i]n only one case (Goldberg v. Kelly, 397 U.S. 254, 266-271, 25 L.Ed 2d 287, 90 S.Ct. 1011), has the Court held that a [predeprivation] hearing closely approximating a judicial trial is necessary."

in reaching their decisions relating to the process which a discharged state employee was due to receive prior to the termination of his employment.[17]

The rule in the Fifth Circuit, and now in the Eleventh Circuit,[18] regarding the pretermination requirements in the case of a public employee was laid down in Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976) (vacated on other grounds, 438 U.S. 901, 57 L.Ed 2d 1144, 98 S.Ct. 3118 [1978])[19]

17. Meanwhile, this Court has reaffirmed that where a predeprivation hearing is impractical or impossible, a "full and immediate," "meaningful" postdeprivation hearing can satisfy the requirements of due process (Parratt v. Taylor, 451 U.S. 527, 540-41, 68 L.Ed 2d 420, 431-32, 101 S.Ct. 1908 [1981]), but it has again cautioned: "To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." See Logan v. Zimmerman Brush Company, 455 U.S. 422, 434, 71 L.Ed 2d 265, 276-77, 102 S.Ct. 1148 (1982). (Emphasis added).

18. The Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981. See, Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

19. This Court vacated and remanded Thurston for

as follows:

> "Where a governmental employer chooses to postpone the opportunity of a nonprobationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision."[20] (Emphasis added).

531 F.2d at 1273. (Footnotes omitted).

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reconsideration in light of Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 56 L.Ed 2d 611, 98 S.Ct. 2018 (1978). On remand, the Fifth Circuit revised its opinion in Thurston (578 F.2d 1167), but left intact its pretermination proceedings analysis, which is still binding precedent in the Fifth Circuit. See Jackson v. Stinchcomb, 635 F.2d 462, 466, n. 5 (5th Cir. 1981). While the Fifth Circuit panel in Thurston recognized that Arnett v. Kennedy, 416 U.S. 134, 40 L.Ed 2d 15, 94 S.Ct. 1633 (1974), only approved existing regulations as being sufficient to meet the requirements of pretermination due process and did not mandate that the same standards be adopted as minimal requisites, the panel nonetheless used the Arnett criteria as a guide to develop the Fifth Circuit's minimal standards. 531 F.2d at 1273.

20. As the Court of Appeals has acknowledged in its

At the time this case was tried, the controlling precedent was considered to be Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980). There, a city employee was discharged on October 7 without a hearing of any kind, and he had a meeting with the city manager on October 18, but he was not given

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opinion, the plaintiff below was accorded no opportunity at all prior to his termination for any kind of hearing, but he was permitted to appear before the Respondent employer (Commissioner Eagerton) some three weeks later on August 11, 1980, to present any evidence or arguments that he wished to present. 696 F.2d at 1286, n. 4. The commissioner offered to name a designee to conduct the hearing, but the employee elected to answer the charges orally before Commissioner Eagerton since he had never had that opportunity, and since the designee would be someone from Eagerton's staff, and under Eagerton's control, and since Thurston gave the employee the right to "respond orally before [Eagerton, as] the official charged with the responsibility of making the termination decision." 531 F.2d at 1273. The employer did not call any witnesses and did not present any evidence against the employee at the August 11 hearing, but, in accordance with Alabama law (§36-26-27, Code of Alabama 1975), the employee requested and received a full-evidentiary hearing before the Alabama State Personnel Board on February 18, 1981. 696 F.2d at 1286, 1288-89. The Alabama statute does not provide for a pretermination hearing of any kind. At this latter hearing, the employee was allowed to cross-examine witnesses against him for the first time. 696 F.2d at 1286.

a full-evidentiary hearing until November 9, when he appeared before the mayor and city council and, for the first time, was there given the opportunity to cross-examine witnesses against him. 614 F.2d at 469-470. The Fifth Circuit panel in Glenn held that the employee was denied due process of law in that he was terminated without any pre-termination hearing, but that the procedural error was "cured" when the employee was given a full-evidentiary hearing on November 9 before the mayor and city council. 614 F. 2d at 472-73.

Relying upon Glenn, the plaintiff insisted that the procedural defects in this case were not "cured" until he received his full-evidentiary hearing on February 18, 1981. The trial court surmised, however, that the "curing" took place on August 11, 1980, when the employee appeared before Eagerton. In an opinion denying the plaintiff's renewed motion for summary judgment, the trial court said:

"Although there appears to be no case defining the form of a post-termination hearing, required to satisfy due process, the Court is of the opinion that the hearing provided by Eagerton on August 11, 1980, coupled with the administrative procedure provided to all merit system employees in Alabama of having that decision reviewed by the Personnel Board, afforded plaintiff due process and cured any defects caused by Eagerton's initial failure to provide a pre-termination hearing. Thus, plaintiff is only entitled to back pay until August 11, 1980."[21]

(R. 869).

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21. The trial court awarded back pay under the authority of Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980). Subsequently, a Unit B panel of the former Fifth Circuit in Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981) (decided on October 13, 1981), held that damages in the form of back pay could not be awarded for a procedural due process violation for the period between the procedurally improper discharge and the date of the procedurally proper post-termination hearing. Wilson is binding precedent in the Eleventh Circuit. See Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982). Commissioner Eagerton voluntarily paid the back pay up to August 11, and the question of the propriety of that payment is therefore not an issue on this appeal. 696 F.2d at 1288, n. 6. However, by limiting the back pay award to August 11, 1980, and not extending it to February 18, 1981, the trial court clearly revealed that it concluded that the procedural defects were "cured" under the Newman standard on the date Eagerton held his "hearing," August 11.

The opinion of the Eleventh Circuit acknowledges that the plaintiff contended that the appearance before Eagerton on August 11 was insufficient to "cure" the procedural violations, but then asserts that such hearing, followed by the full-evidentiary hearing on February 18, 1981, "cured" the defect. In other words, the court essentially treated the posttermination appearance before Eagerton as a "substitute" for the defective pretermination procedure. At 696 F.2d 1289, the Eleventh Circuit said:

> "While we do not condone the utilization of post-termination hearings as a substitute for pre-termination procedural due process, in this case the post termination procedures were sufficient to cure any pre-termination defect."

Questions left uncertain are (1) just what is required to "cure" a pretermination procedural due process defect and (2) what is the effect of such "cure?"

Cases decided by courts of appeals in other circuits reveal a wide divergence of

holdings,[22] but apparently none refer to the "curing" of pretermination deficiencies by the use of posttermination procedures.

The Tenth Circuit in Johnston v. Herschler, 669 F.2d 617, 619-20 (10th Cir. 1982), held that, where state law does not provide for any pre-discharge hearing but does provide for post-discharge proceedings, the post-discharge proceedings adequately protected the employee's due process rights. Accord, Kersey v. Shipley, 673 F.2d 730 (4th

22. The Tenth Circuit has recently even held that a discharged public employee with a property interest was not entitled to confrontation and cross-examination of witnesses against her, at any stage of the proceedings, at least where the "plaintiff has not attempted to show that additional procedures might have changed the result." See Rosewitz v. Latting, 689 F.2d 175, 177 (10th Cir. 1982). On the other hand, the Eighth Circuit has held that due process guarantees a discharged employee "an opportunity to be confronted with all adverse evidence and to have a right to cross-examine available witnesses," and that "[w]here a party is precluded from exercising this fundamental right, the review procedure is constitutionally defective, and cannot be excused as harmless error." See Nevels v. Hanlon, 656 F.2d 372, 376 (8th Cir. 1981). (Citations omitted).

Cir. 1982).[23]

Recently, the Tenth Circuit held in Miller v. City of Mission, Kansas, 705 F.2d 368, 372 (10th Cir. 1983), that a hearing must be held "before" termination becomes effective "except in emergency situations" when the "Rule of Necessity" applies, and that a posttermination hearing did not otherwise satisfy due process requirements.

The Ninth Circuit has recently held that "[t]here is a strong presumption that a

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23. These latter two cases from the Tenth and Fourth Circuits, in holding that state law controls the question of whether predeprivation procedures can be dispensed with, seem diametrically at odds with this Court's recent pronouncement in Logan v. Zimmerman Brush Company, 455 U.S. 422, 432, 71 L.Ed 2d 265, 275, 102 S. Ct. 1148 (1982):

> "Each of our due process cases has recognized, either explicity or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' Vitek v Jones, 445 US 480, 491, 63 L Ed 2d 552, 100 S Ct 1254 (1980)."

public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or liberty interest." See Vanelli v. Reynolds School District No. 7, 667 F.2d 773, 778 (9th Cir. 1982). The court there held that posttermination proceedings were not sufficient to satisfy the due process clause, but only after applying the three-part balancing test of Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed 2d 18, 96 S.Ct. 893 (1976).

In the previous Ninth Circuit case of Miller v. Williams, 590 F.2d 317, 321 (9th Cir. 1979), the court had held that pretermination proceedings were "sometimes, but not always" required, and that pretermination procedures were not required where such proceedings would not have altered the risk of the improper dismissal of the employee.

The Eighth Circuit in Kennedy v. Robb, 547 F.2d 408, 413 (8th Cir. 1976), cert. den., 431 U.S. 959, 53 L.Ed 2d 278, 97 S.Ct. 2687 (1977), observed that an opportunity

must be provided for some form of hearing before the deprivation takes effect except in extraordinary situations. The court observed that "[t]he need at this stage of the proceedings is to minimize the employee's risk of wrongful termination, not a decision on the merits." 547 F.2d at 414. It also applied the balancing process outlined in Matthews v. Eldridge, supra, and examined the case of Arnett v. Kennedy, 416 U.S. 134, 40 L.Ed 2d 15, 94 S. Ct. 1633 (1974), and held that the employee, at a minimum, was entitled to "an opportunity, prior to suspension and discharge, to make a rebuttal to the charges made against him." 547 F.2d at 415.

The Seventh Circuit in Muscare v. Quinn, 520 F.2d 1212, 1216 (7th Cir. 1975), cert. granted, 423 U.S. 891, 46 L.Ed 2d 122, 96 S.Ct. 187, cert. dismissed, 425 U.S. 560, 48 L.Ed 2d 165, 96 S.Ct. 1752, reh. den., 426 U.S. 954, 49 L.Ed 2d 1194, 96 S.Ct. 3183 (1976), noted that a pre-suspension hearing

for a public employee was required, and that post-suspension proceedings could not substitute therefor, except where "emergency disciplinary problems" required summary action pending a later hearing.

The decided cases among the circuits demonstrate a misconception of this Court's decisions in Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed 2d 548, 92 S.Ct. 2701 (1972), and Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed 2d 18, 96 S.Ct. 893 (1976).[24] As we read those cases (and the cases cited therein), they stand for the

24. The requirements of this Court that some form of predeprivation hearing be provided except in extraordinary circumstances involving emergencies or situations where predeprivation hearings are impossible or impractical does not simply reflect an abstract but desirable principle. Due process requires such a holding because an employee is in a very different position after discharge than he is in prior to discharge. Skehan v. Bd. of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), vacated and remanded on other grounds, 421 U.S. 983, 44 L.Ed 2d 474, 95 S.Ct. 1986 (1975), on remand, 538 F.2d 53 (3rd Cir. 1976) (en banc), on appeal from remand, 590 F.2d 470 (3rd Cir. 1978), accord, Arnett v. Kennedy, supra, 416 U.S. at 217-23, 40 L.Ed 2d at 69-73 (Marshall, J, dissenting).

proposition that only bona fide emergencies showing a necessity for dispensing with pretermination proceedings can justify the total absence of pretermination safeguards. However, as has been shown, several of the circuits have not searched for "emergency" exceptions, but instead have applied the balancing tests of Mathews v. Eldridge, supra, not to determine the form of predeprivation proceedings, but instead to determine whether there is an entitlement to any kind of predeprivation proceedings. This is true although Roth expressly pointed out that the "balancing process" was inappropriate when addressing the question of whether the constitution guaranteed "some form of a hearing before deprivation of a protected interest." 408 U.S. at 570, 33 L. Ed 2d at 557, n. 8.[25]

25. Likewise, Mathews v. Eldridge did not address the question of whether a claimant was entitled to any procedural protections at all before the termination of disability benefits. Rather,

The procedural due process issues in the instant case were not submitted to the jury, but were submitted to the trial court by means of motions for summary judgment.[26] Through that mechanism, the plaintiff was only awarded back pay from July 17, 1980, to August 11, 1980, and was also denied any recovery for mental and emotional distress and loss of reputation which may have been caused by the due process violation. Although the petitioner sought a remand for a determination of those damages (see brief [p 45] and reply brief [p. 23] of Appellant-Cross-Appellee) under Wilson v.

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this Court there observed that administrative procedures provided substantial predeprivation rights and concluded that a claimant was not entitled to an "evidentiary hearing" prior to such termination (424 U.S. at 349, 47 L. Ed 2d at 42), and reversed the lower courts which had held "that due process requires an evidentiary hearing prior to termination." 424 U.S. at 339 -340, 47 L.Ed 2d at 36. (Emphasis added).

26. For this reason, several exhibits, including Plaintiff's exhibits 174, 181, 183, 184, 185, 188, and 189 were admitted into evidence, but were not submitted to the jury. (See R. 682 for Clerk's Record of Exhibits).

Taylor, 658 F.2d 1021 (5th Cir. 1981), the Eleventh Circuit did not remand the cause, ostensibly due to its holding that "in this case the post termination procedures were sufficient to cure any pre-termination defect." 696 F.2d at 1289.

For the reasons hereinabove stated, certiorari is appropriate in this cause under Rule 17.1(c) because the decision of the Court of Appeals involves an important question of federal law which has not been, but should be, settled by this Court and is in conflict with applicable decisions of this Court. Additionally, certiorari is appropriate under Rule 17.1(a) because the decision of the Court of Appeals is in conflict with the decisions of other courts of appeals.

3. THE PLAINTIFF IS ENTITLED TO RECEIVE BACK PAY FROM THE DATE OF HIS PROCEDURALLY DEFICIENT TERMINATION UNTIL FEBRUARY 18, 1981, THE DATE OF THE FULL-EVIDENTIARY HEARING.

Relying upon Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980), the district court in this case entered summary judgment for the Plaintiff against Commissioner Eagerton, in his official capacity, and awarded the amount of the plaintiff's back wages from July 17, 1980, to August 11, 1980 (the dismissal date to the date of the first post-termination hearing). (R. 467-71; 696 F.2d at 1288, n. 6).[27] The question of whether the plaintiff was entitled to back pay from August 11, 1980, to the date of the full-evidentiary hearing on February 18, 1981, was at issue and the trial court

27. Eagerton voluntarily paid that amount, so the payment thereof was not an issue in this appeal. For the reasons stated in Part 2 of the argument portion of this petition, the plaintiff insists that the procedural due process violations against him continued until February 18, 1981, the date upon which he was provided a full-evidentiary due process hearing before the state personnel board.

denied that relief to the plaintiff. (R. 869). The Court of Appeals alluded to the fact that Wilson v. Taylor, 658 F.2d 1021, 1035 (5th Cir. 1981), decided after the trial of the instant case, had held that a former employer "may not recover--as damages for the procedural due process violation--back pay . . . which would have accrued had [he] worked from the date of the procedurally improper discharge . . . until the date of the procedurally improper [sic][28] hearing." 696 F.2d at 1288, n. 6.

The Wilson panel observed that the panel in Glenn v. Newman, supra, did not consider Carey v. Piphus, 435 U.S. 247, 55 L.Ed 2d 252, 98 S.Ct. 1042 (1978), in reaching the decision to award back pay after the denial of only the procedural due process rights of a dismissed public employee. The

28. The actual text of Wilson v. Taylor reads "proper" instead of "improper." See 658 F.2d at 1035.

Wilson panel rationalized that back pay was not awardable to the employee because this Court in Carey had observed that suspended students were not entitled to recover the pecuniary value of the school time they missed if it was ultimately determined that there was just cause for their suspensions.[29]

A careful examination of Carey, however, will reveal that the contentions there made were (1) that substantial damages were awardable for procedural due process violations whether or not actual injury ensued, and (2) that every procedural due process

29. Carey (435 U.S. at 260, 55 L.Ed 2d at 263, n. 15) had footnoted four circuit court cases where employees had been "awarded back pay for solely procedural due process violation[s] from the time of termination until the time of either a procedurally adequate posttermination hearing or the time the employee[s'] property interest in . . . employment would have ceased." Wilson v. Taylor, supra, 658 F.2d at 1033-34. Wilson thus purported to overrule the holding in Glenn by saying that a dismissed employee was not entitled to such back pay when his termination was proved justified although his procedural due process rights had been violated.

violation is presumed to cause injury. 435 U.S. at 254, 55 L.Ed 2d at 259. This Court substantially rejected those arguments, but held that nominal damages were awardable even in the absence of any proof of actual damages "[b]ecause the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . ." 435 U.S. at 266, 55 L.Ed 2d at 266. This Court specifically noted that the parties did not contest the proposition that the students could not recover damages to compensate them for their suspensions if only their procedural due process rights were deprived,[30] observing that such deprivation "could not properly be viewed as the cause of the suspensions." 435 U.S. at 260, 55 L.Ed 2d at 262.

30. It is thus clear that the primary Carey language relied upon in Wilson, i.e., that the students there were not entitled to recover damages for the injuries caused by their suspensions if only their procedural rights were violated, was dictum, because that question was

The precise question of whether a public employee is entitled to back pay from the date of his discharge[31] to the date that his procedurally adequate hearing established the discharge as justified has not been dealt with by the Supreme Court.

Neither this Court in Carey v. Piphus, supra, nor the panel in Wilson v. Taylor, supra, adequately analyzed the principles enunciated in Fuentes v. Shevin, 407 U.S.

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not in issue in the case. See McDaniel v. Sanchez, 452 U.S. 130, 141, 68 L.Ed 2d 724, 734, 101 S.Ct. 2224 (1981). Certainly, the statement by this Court in Carey in a footnote casting doubt upon whether back pay is awardable to discharged public employees when only their procedural rights are violated constituted only the pronouncement of an abstract legal principle. 435 U.S. at 260, 55 L.Ed 2d 263, n. 15. The facts in Carey do not remotely touch the question of the back pay entitlement of a discharged public employee.

31. Carey did not involve the complete deprivation of a property interest, but only 20-day suspensions of students from school. It might thus be said that this Court was impressed by the fact that if the students were ultimately going to have a 20-day suspension imposed upon them, anyway, it would be futile to compensate them for the loss of one procedurally deficient suspension period and then impose an additional 20 days after a procedurally sufficient suspension based upon the same allegations.

67, 32 L.Ed 2d 556, 92 S.Ct. 1983 (1972). There the Court determined that the Florida and Pennsylvania prejudgment replevin statutes were constitutionally deficient for failing to provide hearings prior to the initial seizure of personal property,[32] and found that the specific property interest lost by the owners in Fuentes as a result of inadequate predeprivation procedural

32. Those state statutes provided adequate bonding procedures through which the property owners could recover possession of their property before final judgment. The statutes also provided for procedurally adequate hearings prior to final judgment. However, those provisions were held to be "far from enough by themselves to obviate the right to a prior hearing of some kind." 407 U.S. at 84, 32 L.Ed 2d at 572. Observing that "[t]his Court has not . . . embraced the general proposition that a wrong may be done if it can be undone" (407 U.S. at 82; 32 L.Ed 2d at 571), the Fuentes Court held that the procedural safeguards of the FOURTEENTH AMENDMENT could be invoked regardless of "the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods." 407 U.S. at 87, 32 L.Ed 2d at 574. Specifically, the Court rejected the argument that "due process of law would have led to the same result because [the owner] had no adequate defense upon the merits." 407 U.S. at 87, 32 L.Ed 2d at 574 (quoting from Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 59 L.Ed 1027, 1032, 35 S.Ct. 625 [1915]).

protections was "the interest in [the interim] continued possession and use of the goods." 407 U.S. at 86, 32 L.Ed 2d at 573. (Emphasis added). Where one's right to be continued public employment is taken from him without a hearing, his continued possession and use of his property interest therein is likewise interrupted until he is given a hearing. The Due Process Clause "denies the States the power to 'deprive any person of life, liberty, or property without due process of law,'" and also "protects the right to compensation for property taken by the State." Duncan v. Louisiana, 391 U.S. 145, 147-48, 20 L.Ed 2d 491, 88 S.Ct. 1444, reh. den., 392 U.S. 947, 20 L.Ed 2d 1412, 88 S.Ct. 2270 (1968) (emphasis added); Village of Norwood v. Baker, 172 U.S. 269, 43 L.Ed 443, 19 S.Ct. 187 (1898).

It simply seems prohibitively antistrophic to say that one is constitutionally guaranteed that he can retain his property until he is accorded due process, but that

he is not entitled to compensation for the loss of its use regardless of how it is taken if it is ultimately determined that the property could have been lawfully taken by providing due process in the first place.[33]

In the case of a public employee discharged without the protection of procedural due process, he loses his pay and employment benefits until he is accorded a right to a hearing, regardless of whether the discharge is ultimately proved justified. In Wilson v. Taylor, supra, the panel quoted language from Carey v. Piphus, supra, applying general principles of causation in actions for damages. In essence, if procedural deficiencies do not cause the property loss, it was held that substantial damages cannot be

33. Fairly read, Wilson v. Taylor, supra, held that one could recover damages for all sorts of injuries (i.e., emotional distress and damage to his reputation) which might have been caused by the unlawful taking of his property, but that he could not recover damages for the loss of the use of such property unlawfully taken.

recovered for such loss. Such a broad holding first overlooks the timing of the loss as well as the incremental nature of one's interest in his property.[34]

The focus in Wilson v. Taylor on causation also overlooks the equitable nature of back pay as a restoration of benefits wrongfully taken. In Whiting v. Jackson State University, 616 F.2d 116, 122, n. 3 (5th Cir. 1980), an award of back pay under Title VII or 42 U.S.C. §1983 was recognized as an

34. A public employer could discharge an employee, for example, with no notice and no reason whatsoever and with no hearing, and thereby commit the most egregious procedural violations. In such case, Wilson would permit the employer to subsequently find and frame sufficient reasons for the discharge and conduct a hearing, and thereby immunize himself from damages for the loss of job benefits if he can show that he could have justifiably discharged the employee with procedural protections in the first place. The employee would thereby be unquestionably deprived of the use and benefits of his property interests without due process of law, and such incremental property interests would have been taken totally without compensation. Absent compelling reasons, the employer should be required to postpone the taking until he can meet the due process standards. If he does not, the early taking caused at least the temporary interim loss of the use of the property.

"order of restoration of lost benefits" and therefore "is equitable because it is in the nature of an injunction."

It is submitted that the application of Carey dictum to the facts in Wilson and to those in this case simply do not carry the weight of logic. As Justice Powell said recently in a footnote in his separate concurring opinion in Logan v. Zimmerman Brush Company, 455 U.S. 422, 443, 71 L.Ed 2d 265, 283, 102 S.Ct. 1148 (1982):

> "It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinions in these areas often are criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved. Yet I suppose we would all agree--at least in theory--that unnecessarily broad statements of doctrine frequently do more to confuse than to clarify our jurisprudence."

The Plaintiff earnestly contends that he is entitled to back wages for the period of time before he was accorded a full-evi-

dentiary hearing. However, if it is determined that he is not, it is submitted that this cause should be remanded to the district court to address the question of appropriate damages for the deprivation of his procedural due process rights.

It is submitted that certiorari is appropriate upon the question of the petitioner's entitlement to back pay under Rule 17.1(c) because the decision of the Court of Appeals involves an important question of federal law which has not been, but should be, settled by this Court.

4. A PLAINTIFF PREVAILING ON PROCEDURAL DUE PROCESS ISSUES IS ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C. §1988, EVEN THOUGH HE DID NOT PREVAIL ON THE OTHER ISSUES IN THE CASE.

The plaintiff prevailed below in this case on the procedural due process aspects of his claims, when the trial court granted partial summary judgment (R. 467-71) on those issues on April 29, 1981, and even succeeded in having one Alabama statute de-

cleared unconstitutional on procedural due process grounds. 696 F.2d at 1289-90. The plaintiff's motion for allowance of attorney fees (R. 556) on those issues was denied by the trial court upon the theory that the procedural due process question was not the "central issue" in the case, and thus that the plaintiff could not be considered a "prevailing party" under 42 U.S.C. §1988. (R. 911-16). See Best v. Boswell, 516 F. Supp. 1063, 1066-67 (M.D. Ala. 1981).

In order to examine the "central issue" or issues, it is necessary to again partially review the proceedings. From the time of the first complaint on June 12, 1979, and until the plaintiff's initial two-week suspension on May 27, 1980, effective May 30, 1980 (R. 330), there were no procedural due process questions in the litigation. However, from the date of notification of the suspension through the dismissal letters of July 16 and 17, 1980, and up until the trial court entered its summary

judgment on April 29, 1981, the procedural due process aspects of the case were viable issues. There were several procedural deficiencies,[35] although the trial court premised its summary judgment upon the fact that there was never any hearing at all in connection with the plaintiff's suspension, and that there was no pretermination hearing prior to his dismissal. (R. 467-70).[36]

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35. See Part II of this Argument, ante. It was not until February 4, 1981, just prior to the full-evidentiary hearing before the State personnel board, that the charges were finally formed by deleting one charge altogether and by striking portions of another. (R. 375). The full-evidentiary hearing was held on February 18, 1981 (R. 372), after which the plaintiff's dismissal was upheld by the State personnel board. In the meantime, partially because of the insufficiency of the charges, it was necessary for the plaintiff's attorney to file a state court mandamus petition to force the revenue department to divulge specifically what was wrong with the plaintiff's tax returns by requiring it to act on the plaintiff's application for a refund of 1978 taxes. (R. 568). The lack of specificity also made it necessary for the plaintiff's attorney to extend his discovery efforts.

36. The trial court's statement, in its Memorandum Opinion denying attorney fees, that "the facts concerning the procedural due process claim were undisputed, and the issue of law was in no way novel" (R. 911-12), might lead one to the belief that Eagerton did not seriously deny the

This case thus presents an issue perhaps not dealt with in the decided cases: where a case is already in progress when significant procedural due process claims accrue, and the plaintiff diverts to those issues and is victorious in his efforts on

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procedural discrepancies. Such a conclusion would be grossly inaccurate, because the procedural due process claims were vigorously opposed throughout the proceeding.

Eagerton initially resisted the motion for partial summary judgment (R. 362) and sought a rehearing and reconsideration of the summary judgment. (R. 810). In fact, he cross-appealed the procedural due process order as it relates to the plaintiff's suspension. (R. 946). After the plaintiff filed the motion and his supporting brief on March 10, 1981, and after Eagerton filed his opposition thereto (R. 362-69), Eagerton forwarded to the plaintiff a check for $828.68, covering his net pay for the period from July 17, 1980 (the date of the dismissal) to August 11, 1980 (the date of the posttermination "hearing"), of $1,329.09 less payroll deductions. (R. 810). Eagerton argued that this payment rendered "moot" the question of procedural violations as to the dismissal (R. 810), but his attorney staunchly denied that such payment was an acknowledgment that the plaintiff's due process rights had been violated. (R. 908).

The trial court rejected Eagerton's position that the lawsuit was not the cause of the payment of this back pay and, citing Robinson v. Kimbrough, 620 F.2d 468, 478 (5th Cir. 1980), held that the litigation "was more than 'a sig-

those claims alone, although they are vigorously contested, is he nonetheless entitled to his attorney fees as the "prevailing party" on those claims?[37]

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nificant catalytic factor' in achieving the relief sought by the plaintiff on his procedural due process claim." (R. 911). The cited opinion in Robinson was withdrawn and vacated by the Fifth Circuit in Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981), but the replacing opinion did not alter the principle that a plaintiff is a "prevailing party" if his action is a "significant catalyst in motivating the defendants to end their unconstitutional behavior." Id. at 466. See, also, Maher v. Gagne, 448 U.S. 122, 65 L.Ed 2d 653, 100 S.Ct. 2570 (1980).

37. In his motion for attorney fees, the plaintiff sought to studiously avoid seeking any fees for work performed on the case before the procedural issues arose; and included no time in the request for work done after the trial court ruled in his favor on the procedural issues (except for reviewing the court's summary judgment order and preparing the motion for attorney fees). In so doing, the plaintiff felt that he was following, virtually to the letter, the Fifth Circuit's en banc decision in Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981): "In fixing the fee, the district court should be mindful that in complex civil rights litigation, and particularly in prisoners' rights cases, issues are overlapping and intertwined. In order to represent their clients adequately, attorneys must explore fully every aspect of the case, develop all of the evidence and present it to the court. Time spent pursuing successful claims that were clearly without merit should be excluded. However, the

It seems unquestionable that, had the plaintiff prosecuted his due process claim in a separate suit, and even though he might have failed to prove any compensatory or punitive damages, he would have been entitled to an award of his attorney fees. See Carey v. Piphus, 435 U.S. 247, 257, 55 L.Ed 2d 252 260-62, 98 S.Ct. 1042, n. 11 (1978); Familias Unidas v. Briscoe, 619 F.2d 391, 405-06 (5th Cir. 1980). Cf. Wilson v. Taylor, 658 F.2d 1021, 1035 (5th Cir. 1981): Plaintiff did not argue entitlement to attorney fees if only nominal damages were awarded for procedural due process violations, but if the plaintiff prevailed "only on his claim for damages resulting from pro-

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mere fact that the litigants did not succeed in obtaining a judgment on all of the claims asserted does not mean that time spent pursuing these claims should automatically be disallowed. Instead the court must consider the relationship of the claims that resulted in judgment with the claims that were rejected and the contribution, if any, made to success by the investigation and prosecution of the entire case." (Citations omitted).

cedural due process, then the customary rule would apply, that he is entitled to attorney's fees unless special circumstances render such an award unjust." See, also, McCulloch v. Glasgow, 620 F.2d 47, 52 (5th Cir. 1980).

The plaintiff does not understand the trial court to have been minimizing the importance of procedural due process[38] in the denial of attorney fees, nor does it appear that fees would not have been awarded had the procedural claims been isolated in a separate lawsuit. Rather, the lower courts conceived that the procedural due process issue, being consolidated with substantive due process and FIRST AMENDMENT claims, was not the "central issue"[39] in the case.

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38. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure." Malinski v. New York, 324 U.S. 401, 414, 89 L.Ed 1029, 1037, 65 S.Ct. 781 (1945) (separate opinion). See, also, In re Gault, 387 U.S. 1, 21, 18 L.Ed 2d 527, 542, 87 S.Ct. 1428 (1967).

39. The court derived that standard from Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981),

In Hanrahan v. Hampton, 446 U.S. 754, 64 L.Ed 2d 670, 100 S.Ct. 1987 (1980), reh. denied, 448 U.S. 913, 65 L.Ed 2d 1176, 101 S.Ct. 33 (1980), this Court held that, to be a "prevailing party" under §1988, one must establish "his entitlement to some relief on the merits of his claims," and not win merely a right to proceed with his litigation. 466 U.S. at 757, 64 L.Ed 2d at 674. (Emphasis added). However, in examining the legislative history of §1988, the Court observed that HR Rep. No. 94-1558, p. 8, noted that "the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees" (quoting from Bradley v. Richmond School Board, 416 U.S. 696, 723, 40 L.Ed 2d 476, 495, 94 S.Ct. 2006, n. 28 [1974]). 466 U.S.

Ramos v. Koebig, 638 F.2d 838, 845 (5th Cir. 1981), Familias Unidas v. Briscoe, 619 F.2d 391, 406 (5th Cir. 1980), and Iranian Students Association v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979).

at 757, 64 L.Ed at 674. More importantly, this Court noted that S Rep. No. 94-1011, p. 5, had "explained that the award of counsel fees pendente lite would be 'especially appropriate where a party has prevailed on an important matter in the course of the litigation, even when he ultimately does not prevail on all issues.'" 446 U.S. at 757, 40 L.Ed 2d at 674 (emphasis added by Supreme Court). Summarizing, the Court observed: "It seems apparent from these passages that Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." 446 U.S. at 757-758, 40 L.Ed 2d at 674 (Emphasis added).[40]

Subsequent to the trial court's order denying attorney fees in this case, a few

40. A second case, Maher v. Gagne, 448 U.S. 122, 65 L.Ed 2d 653, 100 S.Ct. 2570 (1980), held that attorney fees may be awarded to a prevailing plaintiff in actions brought solely to vindicate rights secured under federal statutes, as well as in cases where a plaintiff prevails only on a wholly statutory non-civil-rights claim pendent to a substantial constitutional claim.

Fifth Circuit cases have been decided relating to the definition of a "prevailing party" under §1988. In Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981), it was held that a favorable decision on injunctive relief rendered the plaintiffs "prevailing parties," although all members of the class did not prevail on all aspects of the relief sought.

In Robinson v. Kimbrough, 652 F.2d 458, 466-67 (5th Cir. 1981), the Court said:

> "For the same reason, we need not address defendants' argument that even if plaintiffs are prevailing parties with respect to certain of their claims, they should not be allowed to recover attorneys fees for the pursuit of claims on which they obtained no relief, judicial or otherwise. It is sufficient to note that although a district court should not divide a case into 'issue parcels' for purposes of determining whether plaintiffs are prevailing parties, neither is it required to award fees for plaintiffs' efforts on unmeritorious claims, and may, if appropriate, apportion fees between meritorious and unmeritorious claims. Miller v. Carson, 628 F.2d 346 (5th Cir. 1980); Familias Unidas v. Briscoe, 619 F.2d 391, 392, 405-06 (5th Cir. 1980); Hardy v.

Porter, 613 F.2d 112, 114 (5th Cir. 1980). On remand, the parties should be allowed to submit additional evidence on this issue."[41]

The language in Robinson is pertinent to this case because it presupposes that, where several claims exist, a plaintiff who prevails on less than all is entitled to an award of fees.

Marion v. Barrier, 694 F.2d 229 (11th Cir. 1982), seems to be factually similar to this case but with absolutely contrary results to the one at bar.[42]

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41. Although the district court found it "difficult to understand" how the plaintiff's attorneys could have consumed as much time as they did claim on the procedural due process issues, the plaintiff only asks this Court to determine whether he is entitled to attorney fees at all. If so, it is suggested that the setting of the amount be left to the trial court's determination under the standards to be enunciated by this Court under the circumstances of this particular case. Plaintiff fully recognizes that he is not entitled to a fee on unmeritorious claims unless the work theron is "intertwined" with the due process issues under the theory enunciated in Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981).

42. The relief on only procedural issues in Marion seems to have been granted in pre-trial and post-trial orders both before and after the

While the Eleventh Circuit and the Fifth Circuit in this case and some others focused on the "central issue" to determine whether the plaintiff was a "prevailing party," it appears that no other circuit uses that standard. For example, the Seventh Circuit (Lenard v. Argento, 699 F.2d 874, 899 [7th Cir. 1983]) and the First Circuit (Nadeau v. Helgemoe, 581 F.2d 275, 278-79 [1st Cir. 1978]) agree that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." (Emphasis in Lenard, 699 F.2d at 899). The First Circuit has also emphasized that the requirement

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plaintiff lost in a damages trial. 694 F.2d at 231-232, n. 5. The defendants there apparently did not challenge a lower court finding that the plaintiff was a "prevailing party," but the panel nonetheless observed that, under this Court's precedential cases, a plaintiff who prevailed on part of the issues was entitled to an award of fees for those issues on which he prevailed.

that the legal success "achieve some of the benefit the parties sought" merely means that the victory must be substantive and not purely procedural, as in Hanrahan v. Hampton, 446 U.S. 754, 64 L.Ed 2d 670, 100 S.Ct. 1987 (1980). See Coalition for Basic Human Needs v. King, 691 F.2d 597, 600 (1st Cir. 1982).[43]

The very existence of §1988 has been held to be a deterrent against due process

43. The Second Circuit has observed that, where a plaintiff prevailed only on procedural due process claims and was only awarded nominal damages therefor, and lost his substantive claims, he might be entitled to be awarded all of his attorneys fees although he prevailed only on some of the issues. McCann v. Coughlin, 698 F.2d 112, 129 (2nd. Cir. 1983). The McCann court noted, however, that where the meritorious claims were clearly separable from the unsuccessful ones, "the district court should decline to award fees which relate to the unsuccessful claim." 698 F.2d at 130

The Second Circuit also observed that, since judgments declaring certain actions unconstitutional vindicated rights of third parties and helped assure that others are not subjected to similar constitutional deprivations, the award of fees should not be conditioned upon the nature of the relief awarded to the plaintiff in the lawsuit which exonerated those rights. 698 F.2d at 130.

violations. Carey v. Piphus, 435 U.S. 247, 257, 55 L.Ed 2d 252, 260-61, 98 S.Ct. 1042, n. 11 (1978). Can it be that, once one becomes a §1983 plaintiff seeking to vindicate alleged constitutional violations, a defendant can subsequently transgress his due process rights at will and be totally free from §1988 responsibility unless the plaintiff wins on his initial claim? We submit that it cannot.

For the reasons stated, certiorari is appropriate in the case under Rule 17.1(a) because the Court of Appeals has rendered a decision in conflict with decisions of other courts of appeals, and under Rule 17.1(c) because the lower court's decision is in conflict with applicable decisions of this Court.

CONCLUSION

For the reasons herein stated, it is respectfully requested that this Honorable Court grant this petition and issue a writ

of certiorari to review the judgment or decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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* * * * * * * * * * * * * * *

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

1982-83 TERM

ODIS BEST,

PETITIONER-PLAINTIFF

VS.

RALPH P. EAGERTON, JR.,
AND JAMES C. WHITE, AS
COMMISSIONER OF REVENUE
FOR THE STATE OF ALABAMA,

RESPONDENTS-DEFENDANTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

ALVIN T. PRESTWOOD
CLAUDE P. ROSSER, JR.

ATTORNEYS OF RECORD FOR
PETITIONER

* * * * * * * * * * * * * *

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INDEX TO APPENDIX

Odis BEST, Plaintiff-Appellant,

v.

Charles A. BOSWELL, etc. etal,
Defendants,

Ralph P. Eagerton, Jr., et al,
Defendant-Appellee

No. 81-7598

United States Court of Appeals,

Eleventh Circuit.

Jan. 31, 1983.

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, FAY and SMITH*, Circuit Judges.

FAY, Circuit Judge:

Odis Best, a former employee of the Alabama Department of Revenue, appeals from the district court's rulings in an action pursuant to 42 U.S.C. Section 1983 denying motion for partial summary judgment, enter-

* Honorable Edward S. Smith, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

ing final judgment, denying a motion for a new trial, refusing to award equitable relief and refusing to award attorney's fees. Ralph Eagerton, Jr, Revenue Commissioner, one of the defendants at trial and the only appellee, cross appeals the district court's granting of partial summary judgment holding that Alabama Code Section 36-26-28 (1975) is unconstitutional. We affirm the district court on appeal as well as on cross appeal.

FACTUAL BACKGROUND

By 1974, Odis Best had fifteen years experience as a Revenue Examiner for the state of Alabama, and was auditing the corporate and personal income tax returns of Elsie Estes, a widow without business acumen whose husband had been in the pulpwood business. Because of Best's actions, a tax lien was filed. In 1976, the lien remained unsatisfied and Best requested that a second execution of lien be prepared. That May, Best purchased one hundred acres of Estes'

land for approximately $7,000.00. Best then executed a deed to twenty acres to Mrs. Lee G. Stephens for $9,000.00, two thousand dollars more than Best had paid for the entire parcel of which he still owned eighty percent. By November, Estes filed suit against Best alleging that Best had deceived her and exercised undue influence upon her in effecting the purchase of the real property.

Mrs. Stephens, the purchaser of the twenty acres, became alarmed. On February 3, 1977 as a result of their attorneys' negotiations, Best paid Stephens $10,000.00 and Stephens executed a quitclaim deed to the twenty acres. The law suit between Estes and Best was resolved by settlement during 1978.

As a result of what has been termed the "Estes matter," Best was demoted by then Revenue Commissioner Boswell from his supervisory position. Eagerton assumed the office of Revenue Commissioner on January 15, 1979. There is some disagreement as to

Eagerton's statements regarding reinstatement of Best to a supervisory position. Best was not reinstated and instituted the present action, which did not name Eagerton or the Department of Revenue as a defendant.[1] In December 1979, Eagerton learned that, despite an agreement with Best and his attorney to the contrary, Eagerton was going to be added as a defendant in the suit. At this time, Eagerton reviewed Best's income tax returns and discovered that the Estes-Stephens land transactions had not been reported. Correspondence between Eagerton and Best ensued. A meeting also occurred between the two men in which Eagerton told

1. The initial complaint, filed June 12, 1979, named as defendants Boswell, Atkins (Director of the Field Division of the Alabama Department of Revenue) and Bradshaw (Director of the Income Tax Division of the Alabama Department of Revenue). Defendant Atkins was subsequently dismissed with the consent of all parties. R. 463. Boswell and Bradshaw remained defendants in the several amendments to the complaint, however, the jury decided the issues in favor of these defendants and the demotion issue is not raised on appeal.

Best that if Best did not adhere to the agreement not to name Eagerton as a defendant, Eagerton would fire him. Best's returns were assigned to an auditor with instructions to keep the audit confidential.

The auditor and Best communicated both by mail and in person. The auditor, Johnson, reported that Best was not furnishing requested information and that Best was using his expertise in Alabama tax law to thwart the audit. On the basis of this information, and without a hearing Eagleton suspended Best from his position for two weeks. The propriety of this suspension is the subject of the cross appeal.

While Best was suspended, the Department of Revenue issued a subpoena for records and such records were examined. Additional records were requested and Best's attorney agreed to produce these records at a later date. In the interim, however, the auditors presented their results on Best's

audit to Eagerton and Revenue Department attorneys. The attorneys advised Eagerton that sufficient grounds existed to dismiss Best from employment. On July 16, 1980, Eagerton drafted the dismissal letter,[2]

2. The letter stated:

> Dear Mr. Best:
>
> You have worked in this Department for over eighteen years. Fifteen of those years as a Revenue Examiner conducting income tax audits and three years supervising examiners performing income tax audits.
>
> I have always assumed that with this experience, you had a good understanding of the Alabama statutes as they relate to income tax.
>
> The results of an audit of your and your wife's income tax reports for the calendar years 1976, 1977 and 1978 gives me reason to believe that you have filed false or fraudulent returns for those years as to the following:
>
> 1. You received money from the sale of a parcel of land which was not reported.
> 2. You sold personal assets which were not reported.
> 3. You failed to furnish records to substantiate certain deductions claimed.
> 4. You have failed to give your whole-hearted cooperation during the conduct of this audit as benefits an employee of the Department of Revenue, in my opinion.
>
> In view of the above, I have no alternative but to dismiss you from State service as of 5:00 o'clock P.M., July 16, 1980.
>
> If you would like a hearing on these charges, I will arrange one for you for 2:00 P.M., July 23, 1980.

which Best received the next day.[3]

Best's attorney requested that the reasons for dismissal be delineated with greater specificity, and Eagerton complied by sending a letter as follows:

Dear Mr. Best:

Pursuant to the request of your attorney, Alvin Prestwood, for an itemization in detail of the reasons for your dismissal from the employment of the State of Alabama, Department of Revenue, the following constitute the specifics of the charges contained in your letter of dismissal dated July 16, 1980 and July 17, 1980, in which you were advised of my reasons to believe that you

_____

Please inform me of your wishes in this regard

Very truly yours,
Ralph P. Eagerton, Jr.
Commissioner of Revenue

3. Because the letter was not delivered to Best until the following day, the effective date of dismissal was amended to 5:00 P.M., July 17, 1980.

have filed false or fraudulent returns for the calendar years 1976, 1977 and 1978.

CHARGE 1: You received money from the sale of a parcel of land which was not reported.

Sale of 20 acres of land purchased from Mrs. Elsie B. Estes and located in Autauga County, Alabama in August 1976 for the sum of $9,000.00, resulting in a taxable gain which was not reported in your 1976 Alabama income tax return.

CHARGE 2: You sold personal assets which were not reported.

A. 1972 Rambler Ambassador 4-Dr. Sedan-the income from which was not reported for 1976.

B. 1970 Plymouth Fury 4-Dr. Sedan-the income from which was not reported for 1977.

C. 1972 Dodge-the income from which was not reported for 1977.

D. 1973 Ford-the income from which was not reported for 1977.

E. 1974 Ford Galaxie 4-Dr. Sedan-the income from which was not reported for 1978.

F. Boat-the income from which was not reported for 1977.

CHARGE 3: You failed to furnish records to substantiate certain deductions claimed.

In conjunction with an official investigation of your state income tax return for calendar year 1976, you were requested by me to furnish documentation to support your claim for deduction for contributions, interest expense, casualty loss and your claim of a dependent exemption for M.D. Best. In lieu thereof, you tendered to me a check in the amount of $117.24 for additional taxes owed. As of this date, you have failed to provide such substantiation as to contributions and the dependent claimed.

CHARGE 4: You failed to give your whole-hearted cooperation.

You failed to produce the documents and information referred to in #3 above. In ad-

dition, you have repeatedly failed to furnish documents and information to revenue examiners, David Johnson and James R. Hodges requested by them in order to complete their audit. On more than one occasion you have broken appointments with these examiners and have walked out during meetings with these examiners. On more than one occasion you have told these examiners that you would not comply with their requests for information and documents unless such requests were put in writing. You also failed to furnish information and documentation upon the repeated requests of these examiners in conjunction with the purchase and sale of land set out in paragraph 1 above and in conjunction with the purchase and sale of the personal property set out in paragraph 2 above.

As your attorney was apprised in court on July 18, this is to inform you that due to my being a party in the case of Best v. Boswell, I consider that it would be in your best interest and would insure a fair and

impartial hearing for me to name a designee to conduct the hearing now set for August 8, at 2:00 P.M. I plan to name such a designee unless you have objections to my doing so. If you do, please communicate any objections and the reasons therefor, to me prior to the scheduled hearing.

/s/Ralph Eagerton

Best declined to have a designee named and was thereafter afforded a hearing before Commissioner Eagerton on August 11, 1980. Eagerton affirmed the termination.[4] Best had previously notified the State Personnel

4. Dear Mr. Best:

Pursuant to the policies of this department and upon the request of your attorney, Mr. Alvin Prestwood, an administrative hearing was held at 2:00 p.m., on August 11, 1980, concerning certain charges of which you had previously been notified. At such hearing, you were afforded an opportunity to present any evidence, testimony, documents, call any witnesses and present any argument that you or your attorney might choose to present. Also at your request, made through Mr. Prestwood, I acted as the hearing officer at such hearing. After having carefully weighed and considered all of the evidence and arguments presented at the hearing on August 11, 1980, it

Board that he wished to appeal. The State Personnel Board held a hearing on February 18, 1981 lasting over thirteen hours at which both sides were represented by counsel, called witnesses, cross-examined witnesses and introduced evidence. The Board sustained Best's dismissal and Best did not appeal.

In federal district court, Best pursued his Section 1983 action, amending the complaint several times. The district judge granted Best's motion for partial summary judgment and held that "a merit system employee may not be suspended without some kind of notice and some kind of hearing and that Alabama Code Section 36-26-28 is unconstitutional insofar as it permits suspensions without a prior hearing." The district

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is my opinion that based upon the evidence presented to me, there is ample reason to believe that each of the charges against you are true and correct and that your termination from state employment should be upheld. Accordingly, I hereby so hold and affirm the termination, of which you have previously been notified.

/s/Ralph Eagerton

judge therefore entered judgment in Best's favor for back pay during the period of Best's suspension (May 30, 1980 through June 13, 1980) and Eagerton cross-appeals the entry of this judgment.

The cause proceeded to jury trial and the jury found in favor of all defendants and judgment was entered accordingly. The district court denied Best's motion for new trial, or alternatively to award injunctive relief in the form of reinstatement with full back pay as well as Best's motion for attorney's fees. Best v. Boswell, 516 F.Supp. 1063 (M.D.Ala.1981). Best timely filed a notice of appeal and raises the following issues for our consideration: whether the district court should have granted Best a new trial on the ground that the jury verdict was contrary to the great weight of the evidence; whether the district court should have awarded Best equitable relief; whether the post termination hearing was sufficient to cure any pretermination de-

ficiencies regarding Best's dismissal; and whether Best is entitled to an award of attorneys' fees. Eagerton cross-appealed on the issue of the constitutionality of Alabama Code Section 36-26-28 (1975).

LEGAL DISCUSSION

The Jury Verdict and Equitable Relief

Best contends that the jury verdict in favor of Eagerton on the damage claim was against the great weight of the evidence. However, Best's brief on appeal belies any conviction that his contention deserves serious attention, for it states:

> The evidence in this case is supportive of a jury's conclusion that although Eagerton violated the plaintiff's constitutional rights in effecting the plaintiff's termination he, individually, should not be held liable in damages because of the qualified immunity doctrine. That doctrine provides that executive officials who act upon an objective and subjective good faith belief that their

actions are proper and lawful cannot be held liable in damages.

This defense was covered in the jury charges and the application of this defense is particularly appropriate in light of his repeated testimony that he relied on the information and advice of third parties....

Given this evidence, a jury could reasonably conclude that Eagerton, individually, should not be liable in damages because he relied in good faith on information supplied to him by his subordinates and his attorneys and that his actions therefore should be insulated by the qualified immunity defense. It must be remembered however, that ... qualified immunity ... extends only to liability for damages. The qualified immunity doctrine poses no barrier to an award of equitable, injunctive or declaratory relief.

[citations omitted].

Brief of Appellant at 20-21. Appellant Best then commences to discuss the propriety of the trial court's failure to award equitable relief. We agree with Best's concession that the jury verdict was supported by the evidence, although not necessarily his reasoning, and therefore proceed to the issue concerning equitable relief. The parties had agreed that the issue of equitable relief would be decided by the judge after the jury verdict. In such a situation, the role of the trial court is to "exercise its limited discretion to determine the propriety of equitable relief based on the facts as found by the jury." Williams v. City of Valdosta, 689 F.2d 964, 977 (11th Cir.1982).

The district court declined to afford Best equitable relief because it concluded that implicit in the jury verdict were findings that Eagerton did not discharge Best because Eagerton was a defendant in the lawsuit; that Eagerton's decision to dismiss Best was not arbitrary or capricious; and

that Eagerton had good cause to dismiss Best. 516 F.Supp. at 1064-65. The district court found that the jury verdict was "supported by substantial evidence and was not against the great weight of the evidence." Id. at 1065. While the district court did not make explicit findings of fact as to the reasons for Eagerton's discharge of Best, its interpretation of the jury verdict and conclusion that the verdict was supported by substantial evidence is an "implicit finding" which should not be disturbed absent a conclusion that it is clearly erroneous. United States v. Second National Bank of North Miami, 502 F.2d 535, 547 (5th Cir. 1974).

Appellant Best contends that he was fired for including Eagerton in the lawsuit. One can not be constitutionally discharged because of the filing of a lawsuit unless the act would affect the employee's ability to perform his job. Garza v. Rodriguez, 559 F.2d 259 (5th Cir.1977). There is no issue

in Best's case that the litigation would interfere with his job performance. Instead, the issue is one of causation. The United States Supreme Court articulated the applicable standard in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The burden is placed on plaintiff to show that his conduct was constitutionally protected and that this conduct was a "substantial factor" or a "motivating factor" in the employer's adverse action. The court must then determine whether the employer has shown by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Id. at 287, 97 S.Ct. at 576

The district court implicitly found that Best's inclusion of Eagerton in the law suit was not a substantial factor or motivating factor in Best's dismissal. Eagerton's remark to Best that he would be fired because of the inclusion of Eagerton in the

lawsuit occurred seven months prior to the dismissal. During the interim, the intervening audit revealed facts which were considered in the decision to dismiss and Best's conduct during the audit also contributed to the dismissal. We find that the trial court properly exercised its "limited discretion to determine the propriety of equitable relief based on the facts as found by the jury," Williams v. City of Valdosta, supra, and affirm the denial of equitable relief.

The Pre-and Post-Termination Hearings

In its Memorandum Opinion and accompanying Judgment of April 29, 1981, (R. at 467-471) the district court held that Best had a protected property interest in his employment[5] and was entitled to proced-

5. The district court found that the provisions of the Alabama Merit System Act, Alabama Code Section 36-26-1 et seq., provided Best with a "legitimate claim of entitlement" to his continued state employment as required by Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33, L.Ed.2d 548 (1972).

dural due process in relation to his dismissal. We agree. The district court concluded that Commissioner Eagerton's failure to provide a pretermination hearing violated Best's procedural due process rights, but that a subsequent due process hearing was sufficient to cure the defect,[6] relying on Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980).

Appellant Best contends that the post termination proceeding did not satisfy the requirements of procedural due process. Yet there is little to distinguish the facts surrounding Best's termination from those in

6. The district court awarded Best back pay from the time of termination until the post-termination hearing, prior to Wilson v. Taylor, 658 F.2d 1021 (5th Cir.1981), a Unit B case decided October 13, 1981, which held that the former employee "may not recover-as damages for the procedural due process violation-back pay...which would have accrued had [he] worked from the date of the procedurally improper discharge...until the date of the procedurally improper hearing." Id. at 1035. Commissioner Eagerton, however, voluntarily paid the back wages and they are not an issue on appeal.

Glenn v. Newman. In Glenn, the court held that any error involved in the pretermination procedure was cured by the post-termination proceedings where

> Glenn received written notice of the charges against him and was given sufficient time to prepare for the hearing. At the hearing, he was represented by an attorney who examined and cross-examined witnesses on his behalf, and he was allowed to present his case orally.

Id. at 472. After Best received a notice of dismissal outlining the charges against him, see note 2 supra, his attorney requested a more detailed statement which was supplied, see text supra. Best requested a hearing and one was held on August 11, 1980. Best now contends that this hearing was insufficient because the employer did not introduce evidence to sustain the decision to terminate Best. Best had received written notice of the charges against him, had sufficient time to prepare, was represented by an attorney

and was allowed to present his case. Further, after the hearing before Commissioner Eagerton, Best was afforded a full evidentiary hearing before the State Personnel Board at which both sides presented evidence, were represented by counsel, and examined and cross-examined witnesses. The state Personnel Board sustained Best's dismissal.

While we do not condone the utilization of post-termination hearings as a substitute for pre-termination procedural due process, in this case the post termination procedures were sufficient to cure any pre-termination defect. Wilson v. Taylor, 658 F.2d 1021 (5th Cir.1981); Glenn v. Newman, supra.

Attorney's Fees

The district court rejected Best's claim for attorney's fees under 42 U.S.C. Section 1988 on the ground that he failed to meet the statutory requirement of being a "prevailing party." 516 F.Supp. at 1065. Best contends that he is a prevailing party

within the meaning of Section 1988 since he was awarded back pay for procedural due process violations relating to his suspension and his pre-termination proceeding, see note 7, supra.

In determining whether Best is a prevailing party within the meaning of 42 U.S.C. Section 1988, "the proper focus is whether the plaintiff has been successful on the central issue." Iranian Students Association v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979). Further, "a prevailing party need not have prevailed on all issues; it is sufficient that plaintiffs prevail on the main issue." Ramos v. Koebig, 638 F.2d 838, 845 (5th Cir.1981).

The procedural due process claims in this case accrued after the suit had been filed, were added by amendment and were resolved by partial summary judgment. The trial lasted over one week and resulted in jury verdicts in favor of all the defendants. We cannot logically construe the pro-

cedural due process claims as the "central issue" or "main issue" in a suit which sought reinstatement and one million dollars. We agree with the district court that Best's "success on his procedural due process claim against defendant Eagerton was a very minimal part of plaintiff's law suit," 516 F.Supp. at 1066. The district court was correct in its conclusion that Best was not a "prevailing party" under 42 U.S.C. Section 1988 and was not entitled to attorney's fees.

The Constitutionality of Alabama Code Section 36-26-28.

On cross-appeal, Commissioner Eagerton appeals the district court's holding that Alabama Code Section 36-26-28 is unconstitutional. The Alabama statute provides:

> An appointing authority may, from time to time, peremptorily suspend any employee without pay or other compensation and without the right of a hearing as

punishment for improper behavior, but such suspension or total suspension by such appointing authority of such person shall not exceed 30 days in any year of service. Such suspension with loss of pay may be effected only by service upon the employee by the appointing authority of written charges setting out clearly the delinquency for which such suspension was made, a copy of which must be at the same time mailed or delivered to the director. The suspended employee shall have the right to file with the board and the appointing authority a written answer or explanation of such charges.

Alabama Code Section 36-26-28 (1975)

Best was suspended, without a prior hearing, for two weeks. The district court, relying on Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1974), awarded Best back pay for the period of suspension and held that "a merit system employee may not be suspended without some kind of notice

and some kind of hearing and that Alabama Code Section 36-26-28 is unconstitutional insofar as it permits suspensions without a prior hearing." (R. at 469).

The Alabama Code invests state merit system employees with a protected property interest. Thus, before that interest can be suspended, employees "must be given some kind of notice and afforded some kind of hearing." Goss v. Lopez, 419 U.S. at 579, 95 S.Ct. at 738 (emphasis in original). We need not decide the nature of the opportunity to be heard which should be provided to Alabama's merit system employees, but only agree with the district court's conclusion that the statute's unequivocable statement "without the right of a hearing" is unconstitutional.

Conclusion

Having considered the issues raised on appeal and on cross appeal, the judgments of the district court are AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ODIS BEST	)	
Plaintiff	)	
vs.	)	CIVIL ACTION NO. 79-278-N
CHARLES A. BOSWELL etc et al	)	
Defendants	)	

MEMORANDUM OPINION

HOBBS, District Judge.

This cause is now before the Court on plaintiff's motion for a new trial or alternatively, to amend the judgment, and on plaintiff's petition for the allowance of attorney fees and costs.

As to plaintiff's motion for a new trial or his motion to amend the judgment, the jury verdict reflects the jury's determination that the actions of defendants Boswell and Bradshaw did not deprive plaintiff of any constitutional rights and were not

arbitrary or capricious, but were actions justified by plaintiff's conduct.

Similarly, implicit in the jury verdict under the Court's charge is the jury's determination that plaintiff was not discharged by defendant Eagerton because of plaintiff's action of making Eagerton a defendant in this lawsuit. The jury verdict also reflects the jury's determination that Eagerton's decision to dismiss plaintiff was not arbitrary or capricious and that the actions of plaintiff afforded good cause for Eagerton's dismissal of plaintiff.

The jury verdict was supported by substantial evidence and was not against the great weight of the evidence, therefore, the Court declines to order plaintiff's reinstatement with full back pay. In addition, for the reasons set out in the Court's opinions of May 29, 1981 and April 29, 1981, the Court holds that the hearing provided by Eagerton on August 11, 1980, coupled with the administrative hearing before the State

Personnel Board provided plaintiff under Alabama law, afforded plaintiff due process and cured the defect in defendant Eagerton's failure to provide a presuspension and a pretermination hearing. Accordingly, the Court is of the opinion that plaintiff's motion for a new trial or alternatively, to amend the judgment, is due to be denied.

The remaining issue is presented by plaintiff's petition seeking $26,483.00 in attorney fees and $3,152.51 in expenses against defendant Eagerton. The claimed fees and expenses allegedly relate to the procedural due process claim. Plaintiff's attorney recognizes that he is not entitled to attorney fees or expenses for work performed which related to claims on which plaintiff did not prevail. Familias Unidas v. Briscoe, 619 F.2d 391, 406 (5th Cir. 1980).

Defendant Eagerton challenges the attorney fee claim on a number of grounds. His primary contention is that plaintiff was

not the "prevailing party," and the statute allows attorney fees only to the "prevailing party." 42 U.S.C. Sec. 1988. Defendant also challenges plaintiff's contention that the number of hours for which plaintiff seeks attorney fees is related to the actual hours worked on the procedural due process claim. Defendant further contends that defendant voluntarily paid plaintiff everything which plaintiff was entitled to receive on plaintiff's due process claim prior to any adjudication by this Court, and therefore plaintiff's law suit was not the cause of plaintiff's recovery on the procedural due process claim.

This last contention of defendant is rejected. The Court finds that plaintiff's law suit was more than "a significant catalytic factor" in achieving the relief sought by plaintiff on his procedural due process claim. Robinson v. Kimbrough, 620 F.2d 468, 478 (5th Cir. 1980).

Because the Court agrees with defendant's contention that plaintiff is not the prevailing party in this law suit, the Court need not consider defendant's contention tht plaintiff's claim is not fairly limited to those hours related to the issue on which plaintiff prevailed. The Court nevertheless notes that the facts concerning the procedural due process claim were undisputed, and the issue of law was in no way novel. It is difficult to understand how the attorney's efforts on this phase of the case could have consumed the 368 hours which are claimed, even under the most liberal view of a proper allocation of time between the procedural due process claim and the other claims.

The Court must reject plaintiff's claim for attorney fees, however, on the ground that plaintiff failed to meet the statutory requirement for such an award that plaintiff be the "prevailing party." The Court of Appeals for the Fifth Circuit in a number of cases has sought to clarify the meaning of

the words "prevailing party." In Iranian Students Asso. v. Edwards, 604 F.2d 352, 353 (5th Cir. 1980), that Court stated that the prevailing party is the party that prevails on the "the central issue." In Ramos v. Koebig, 638 F.2d 838, 845 (5th Cir. 1981), the court said ". . . it is sufficient that plaintiff prevail on the main issue." In Familias Unidas v. Briscoe, supra, the Court of Appeals stated ". . . the proper focus is whether plaintiff is successful on central issue." Finally, in Taylor v. Sterrett, 640 F.2d 663 (5th Cir. 1981), the court stated ". . . the proper focus is whether plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought."

In determining whether plaintiff was successful on the central issue, the Court must review this litigation. It commenced in 1979 against Commissioner Boswell, Mr. Bradshaw and Mr. Atkins, charging that their actions in transferring and demoting plain-

tiff had been done arbitrarily, wrongfully and in violation of plaintiff's First Amendment rights. In January 1980, some six months after suit was filed against Commissioner Boswell, Bradshaw and Atkins, plaintiff sued Commissioner Eagerton in his official capacity seeking reinstatement in the job from which he had been transferred. On or about June, 1980, Commissioner Eagerton suspended and then terminated plaintiff, and in June 1980, plaintiff sued Commissioner Eagerton in his individual capacity charging Commissioner Eagerton with violating his First Amendment rights in firing plaintiff because plaintiff had filed suit against Commissioner Eagerton and also charging that Commissioner Eagerton had violated his rights by subjcting him to harassment and arbitrary treatment in violation of his rights under the Fourteenth Amendment. Finally on September 23, 1980, plaintiff for the first time charged a violation of his procedural due process rights. The proce-

dural due process claim related to the action of Commissioner Eagerton in suspending and subsequently firing plaintiff without a prior hearing. It is this claim and this claim alone on which plaintiff has prevailed.

Plaintiff's recovery on the procedural due process claim against defendant Eagerton would have resulted in a monetary recovery of approximately two thousand dollars. (Even though defendant paid this sum to plaintiff without an order by this Court, the Court treats this recovery as having been brought about by plaintiff's action in pursuing this law suit.) Plaintiff was seeking a monetary recovery of one million dollars on the claims on which he did not prevail. The fact that the claims on which he prevailed were only a small fraction of the amount in suit is not dispositive that plaintiff did not prevail on the central issue, but it is a consideration tending toward such a conclusion. It is also persua-

sive that plaintiff did not "acquire the primary relief sought." Moreover, plaintiff sought as an important part of his relief, reinstatement in his position. This relief was denied.

Plaintiff testified that the purpose of filing his original law suit was to vindicate his good name against the accusations of wrongdoing leveled at him by defendants. A jury trial which consumed an entire week was directed at plaintiff's efforts to show that he had done nothing wrong and that defendants had demoted and ultimately fired him arbitrarily and in violation of his First and Fourteenth Amendment rights. The jury found against plaintiff on all issues which were submitted to the jury. Defendant Atkins was dismissed from the law suit on plaintiff's motion two weeks prior to trial. Defendants Boswell and Bradshaw prevailed as to all charges brought against them.

Accordingly, this Court finds that plaintiff's success on his procedural due

process claim against defendant Eagerton was a very minimal part of plaintiff's law suit; a part on which plaintiff would have been entitled to a summary judgment had defendant not conceded the correctness of this claim even before summary judgment could be granted.

In Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979), the court noted that plaintiff's procedural due process rights were denied and held that he was entitled to notice and a hearing prior to discharge. These are the same issues on which plaintiff has prevailed in the instant case. The Vermont district court reviewed the scope of that law suit, the multiple issues on which plaintiff did not prevail and concluded:

> To hold that this ruling (that plaintiff was denied procedural due process) would entitle plaintiff to an award of fees as a "prevailing party," however, would stand Section 1988 on its head.

Also see Bayside Enterprises, Inc. v. Carson, 470 F.Supp. 1140 (M.D. Fla. 1979).

This Court is of the opinion that a liberal construction should be given to the term "prevailing party" under Section 1988 in order that a plaintiff will not be inhibited from asserting claims which deserve consideration for fear of losing the right to attorney fees. But this Court is of the opinion that to hold that plaintiff is the prevailing party in this law suit would do violence to the requirement laid down by the Fifth Circuit Court of Appeals that to be regarded as the prevailing party, one must have prevailed on the central issue. Accordingly, the Court concludes that plaintiff's petition for attorney fees should be denied.

A judgment will be ordered in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ODIS BEST)

Plaintiff)

vs.) CIVIL ACTION NO. 79-278-N

CHARLES A. BOSWELL)
etc et al

FILED
) Jun 15 10 27 AM 1981
Defendants Jane P. Gordon, Clerk
) U S District Court
Middle District of Ala
/s/ LMG.
Deputy Clerk

JUDGMENT

In accordance with the memorandum opinion entered this date in the above styled cause, it is ORDERED, ADJUDGED and DECREED that plaintiff's petition for attorney fees be and the same is hereby denied.

It is further ORDERED, ADJUDGED and DECREED that plaintiff's motion for a new trial or alternatively, to amend the judgment, be and the same is hereby denied.

DONE this 15th day of June, 1981.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ODIS BEST)

Plaintiff)

vs.) CIVIL ACTION NO. 79-278-N

CHARLES A. BOSWELL)
etc et al

FILED
) Apr 29 11 37 AM 1981
Defendants Jane P. Gordon, Clerk
) U S District Court
Middle District of Ala
/s/ D
Deputy Clerk

MEMORANDUM OPINION

This cause is now before the Court on plaintiff's motion for partial summary judgment filed herein on March 10, 1981. Upon consideration of said motion, the Court is of the opinion that said motion is due to be granted to the extent set out below.

FACTS

Construing the facts in favor of defendant, the Court concludes that there remains no genuine issue as to the following material facts:

Plaintiff was employed by the State of Alabama Department of Revenue as a Revenue Examiner III, which is a merit system position. By letter dated May 27, 1980, defendant Eagerton, as Commissioner of Revenue, suspended plaintiff without pay for a two week period from May 30, 1980 through June 13, 1980. In this letter, defendant set out the reasons for the suspension, but no form of a hearing was offered to plaintiff.

In addition, by letter dated July 16, 1980, defendant Eagerton dismissed plaintiff from his merit system position, also without a hearing. The dismissal became effective on July 17, 1980. In the July 16, 1980 letter, Eagerton listed four grounds supporting the dismissal and offered to conduct a hearing. Plaintiff's attorney responded by letter dated July 21, 1980 (attached to plaintiff's motion for summary judgment as Exhibit 6). In this letter, plaintiff's counsel requested that defendant Eagerton itemize in detail the reasons for plain-

tiff's dismissal in order to give plaintiff an opportunity to respond. Eagerton made a a detailed itemization in a letter dated July 25, 1980 (attached as Exhibit 7 to plaintiff's motion). On August 11, 1980, Eagerton conducted a hearing in which he allowed plaintiff and his attorney to present evidence and arguments. By letter dated August 28, 1980, Eagerton upheld his previous decision to terminate plaintiff.

Plaintiff filed a notice of appeal to the Alabama State Personnel Board which conducted a full hearing on February 18, 1981. By order dated April 6, 1981, the Personnel Board upheld Eagerton's dismissal of plaintiff.

CONCLUSIONS OF LAW

In his motion for partial summary judgment, plaintiff contends that he was entitled to a hearing prior to his two week suspension and prior to this termination and that defendant's failure to provide such a hearing violated plaintiff's right to proce-

dural due process. It is well settled that in order for plaintiff to be entitled to the safeguards of procedural due process he must have had a property interest in his employment, that is, a "legitimate claim of entitlement" to his continued state employment. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The provisions of the Alabama Merit System Act, Alabama Code § 36-26-1 et seq., establish that plaintiff as a merit system employee, had such a protected property interest in his employment. See Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980). Accordingly, plaintiff may demand the protections of procedural due process.

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). With respect to plaintiff's suspension, Eagerton claims that the letter notifying plaintiff of his suspension and setting out the reasons for such suspension satisfies procedural due process require-

ments. Eagerton further claims that plaintiff was not entitled to a presuspension hearing because Section 36-26-28 of the Alabama Code authorizes suspensions of up to thirty days of merit system employees without a prior hearing. The Court, however, disagrees. In Goss v. Lopez, 419 U.S. 565, 579 (1974), the Supreme Court held that students have a protected property interest in continued public education and cannot be suspended for a ten day period without "some kind of notice and . . . some kind of hearing." (emphasis is original) In light of Goss, this Court is of the opinion, and so holds, that a merit system employee may not be suspended without some kind of notice and some kind of hearing and that Alabama Code § 36-26-28 is unconstitutional insofar as it permits suspensions without a prior hearing.

The Court recognizes that the "nature of the hearing will depend on appropriate accomodation of the competing interests involved." Goss v. Lopez, supra, at 579. In

the present case, however, no kind of hearing was offered to plaintiff prior to his suspension. Accordingly, he was deprived of his rights to due process and is entitled to back pay for the time of his suspension.

With respect to the dismissal, the Court holds that defendant Eagerton's failure to provide a termination hearing also violated plaintiff's procedural due process rights. Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980); Glenn v. Newman, 614 F.2d 467 (5th Cir. 1980). Any claim of pretermination due process violation is cured, however, by a subsequent due process hearing. Glenn v. Newman, supra. In the present case, Eagerton, at the request of plaintiff's attorney, notified plaintiff in detail of the charges against him and conducted a hearing. At the hearing plaintiff was represented by counsel who was afforded the opportunity to present evidence and make arguments. The Court is of the opinion that this hearing was sufficient to satisfy due

process requirements and, consequently, cured the error involved in Eagerton's failure to provide plaintiff with a pretermination hearing. Accordingly, plaintiff is entitled to back pay from the time of the termination, July 17, 1980, until the time of the post-termination procedure, August 11, 1980.

With respect to plaintiff's other contentions in his motion for partial summary judgment, the Court is of the opinion that summary judgment is inappropriate. Accordingly, the remainder of said motion is due to be denied.

A judgment will be entered in accordance with this opinion.

DONE this 29th day of April, 1981.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ODIS BEST)

Plaintiff)

vs.) CIVIL ACTION NO. 79-278-N

CHARLES A. BOSWELL)
etc et al

FILED
) Apr 29 11 37 AM 1981
Defendants Jane P. Gordon, Clerk
) U S District Court
Middle District of Ala
/s/ D
Deputy Clerk

JUDGMENT

In accordance with the memorandum opinion entered this date in the above styled cause, it is

ORDERED, ADJUDGED and DECREED that plaintiff have and recover from defendant Ralph P. Eagerton, in his official capacity as Commissioner of Revenue of the State of Alabama, back pay for (1) the period of plaintiff's suspension from his employment; i.e., from May 30, 1980 through June 13, 1980; and (2) from the time of termination of plaintiff's employment on July 17, 1980

until the post-termination procedure on August 11, 1980.

It is further ORDERED, ADJUDGED and DECREED that the remainder of plaintiff's motion be and the same is hereby denied.

DONE this 29th day of April, 1981.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7598

ODIS BEST

Plaintiff-Appellant,

vs.

CHARLES BOSWELL, ETC. etc. et al

Defendants,

RALPH P. EAGERTON, JR., Etc.,

Defendant-Appellee.

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
Mar 22, 1983
Norman E. Zoller,
Clerk

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 31, 11 Cir., 1983, __ F.2d_ (MAR 22 1983)
Before GODBOLD, Chief Judge, FAY and SMITH*, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure, Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideraion of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT

/s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

UNITED STATES CONSTITUTION, AMENDMENT 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT 14 SECTION 1:

> All persons born or naturalized in the United States, and subject to, the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit

in equity, or other proper proceeding for redress.

42 U.S.C. §1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court, in its discre-

tion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 1975

CODE OF ALABAMA, § 36-36-27(a):

An appointing authority may dismiss a classified employee whenever he considers the good of the service will be served thereby, for reasons which shall be stated in writing, served on the affected employee and a copy furnished to the director, which action shall become a public record. The dismissed employee may, within 10 days after notice, appeal from the action of the appointing authority by filing with the board and the appointing authority a written answer to the charges. The board shall, if demand is made in writing by the dismissed employee within 10 days after notice of discharge, order a public hearing and, if the charges are proved unwarranted, order the reinstatement of the employee under such conditions as the board may determine.

1975 CODE OF ALABAMA, § 36-26-28:

An appointing authority may, from time to time, peremptorily suspend any employee without pay or other compensation and without the right of a hearing as punishment for improper behavior, but such suspension or total suspension by such appointing authority of such person shall not exceed 30 days in any year of service. Such suspension with loss of pay may be effected only by service upon the employee

by the appointing authority of written charges setting out clearly the delinquency for which such suspension was made, a copy of which must at the same time be mailed or delivered to the director. The suspended employee shall have the right to file with the board and the appointing authority a written answer or explanation of such charges.